IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 567 OF 2000
WITH
CRIMINAL APPEAL NO.281 OF 2000
WITH
CRIMINAL APPEAL NO. 388 OF 2000

(1) CRIMINAL APPEAL NO. 567 OF 2000

Union of India]
at the instance of Assistant]
Director, DRI, Mumbai.]...Appellant

Vs.

1. Gopal Shivdaras Mishra]
]
2. State of Maharashtra]..Respondents

....

Mr.J.C.Satpute for Appellant/Union of India
Mr.Ayaz Khan with Mr.S.S.Bhandrey Advocate for respondent No.1/Accused no.2.
Ms.Usha V.Kejeriwal A.P.P. for Respondent no.2.

....

WITH

(2) CRIMINAL APPEAL NO. 281 OF 2000

Umesh Rangayya Shetty]
Age 32 years, Occ; Business]
R/o 18, B-1, Maniyar Bldg.]
Tardeo, Mumbai-400032]
At present in Yerawada Central]
Prison, Pune]..Appellant

Vs.

1. The State of Maharashtra]
]
2. S.S.Dhani,]
Intelligence Officer,]
D.R.I.Mumbai.]..Respondents

....

Mr.Ramrao Adik with Ms.Rajshree Gadvi
Advocate for appellant/accused no.3.
Ms.Usha V.Kejeriwal A.P.P. for Respondent no.1
Mr.J.C.Satpute for Respondent no.2

....

WITH

(3) CRIMINAL APPEAL NO. 388 OF 2000

Krishnanand Venkappa Shetty]
Hindu, Aged about 35 years,]
permanently residing at Bombay]
and presently undergoing]
sentence at Yerwada Central]
Prison, Pune.]..Appellant

Vs.

1. The Intelligence Officer]
Directorate of Revenue]
Intelligence, Hotel]
Woldorf, Colaba]
Bombay-5]
2. State of Maharashtra]..Respondents

....

Mr.Peter Lobo Advocate for Appellant/Accused no.1
Mr.J.C.Satpute for Respondent no.1.
Ms.Usha V.Kejeriwal A.P.P. for the Respondent no.2.

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CORAM : H.L.GOKHALE AND
SMT.V.K.TAHILRAMANI,JJ.

DATE : JULY 14/19/20,2004

ORAL JUDGMENT: (PER SMT.V.K.TAHILRAMANI,J.)

1. Through Appeal Nos. 388 of 2000 and 281 of 2000 appellants i.e. original accused nos.1 and 3 have challenged the judgment and order dated 28th

February, 2000 passed by the learned Special Judge under the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'NDPS Act') for Greater Mumbai. By the said judgment and order, the original accused no.1 Krishna Shetty came to be convicted for the offence under Section 8(c) read with 29 of the NDPS Act, 8(c) read with Sections 22 and 23 of the NDPS Act. Under Section 8(c) read with Section 29, he was sentenced to undergo R.I. for ten years and to pay a fine of Rs.1,00,000/- in default further R.I. for three months. Under Section 8(c) read with Sections 22 and 23, he was directed to undergo further R.I. for a period of ten years and to pay a fine of Rs.1,00,000/- i/d further R.I. for three months. The original accused no.3 Umesh Shetty came to be convicted under Section 8(c) read with Section 29 and Section 8(c) read with Section 27(A) of the NDPS Act and he was directed to undergo R.I. for a period of ten years and to pay a fine of Rs.1,00,000/-, in default of payment of fine R.I. for a period of three months.

2. By the very same judgment and order, the original accused no.2 Gopal Shivdaras Mishra came to be acquitted of all the charges levelled against him. The Union of India at the instance of the D.R.I.

original complainant has filed criminal appeal No. 567 of 2000 challenging the order of acquittal in respect of original accused no.2 Gopal Shivdaras Mishra.

3. The original accused nos.1 and 2 were facing trial in NDPS Special Case No. 496 of 1997. As the original accused no.3 Umesh Rangayya Shetty came to be arrested many months later, the case against him came to be numbered as NDPS Case No.224 of 1998. As the accused persons in both the cases i.e. NDPS Special Case Nos. 496 of 1997 and 224 of 1998 were involved in the same offence, both the cases were tried together by the learned Special Judge and a common judgment came to be delivered by the learned Special Judge. As the accused persons were all tried together and they were involved in the same offence, this common judgment is being delivered in respect of Criminal Appeal No. 281 of 2000, 388 of 2000 and 567 of 2000.

4. Criminal Appeal No. 388 of 2000 has been filed by the original accused no.1 Krishna Shetty. Criminal Appeal No. 281 of 2000 has been filed by original accused no.3 Umesh Shetty. Both these appeals have been filed by these accused against

their conviction and sentence. Criminal Appeal No. 567 of 2000 has been filed by original complainant i.e. DRI authorities against the acquittal of respondent i.e. original accused no.2 Gopal Mishra. For the sake of convenience, we shall refer to all the accused as referred by the trial Court i.e. appellant Krishna Shetty will be referred to as accused no.1. Appellant Umesh Shetty will be referred to as accused no.3 and respondent Gopal Mishra will be referred to as accused no.2.

5. The prosecution case briefly stated is as under:

. On 1.7.1997 P.W.1 Shri.Abhijeet Daherkar, Senior Intelligence Officer received a specific intelligence that a consignment of commercial plywoods is to be exported to DIJIBOOTI in Africa by M/s. Divya Impex, Nerul, New Bombay from Mumbai. The said plywood consignment is stuffed into container No.TEXU-325433-2 and is covered by Shipping Bill No.777612 dated 27.6.1997. It is likely that Methaqualone tablets (a psychotropic substance) are kept concealed in the said consignment of commercial plywoods, stuffed in the container No.TEXU-325433-2. Shri. Daherkar noted down the said information and brought it to the notice of his superiors and on

their direction the C.H.A. (Custom House Agent) was summoned in the office. Pursuant thereto, Shri.Anup Mirdha (P.W.21) of M/s. Pramanik Exim Services attended the D.R.I. office. In presence of two panch witnesses, enquiries were made with Anup Mirdha and he was apprised about the specific information received and request was made to panch witnesses to accompany D.R.I. officers for examination of the said container. Shri.Anup Mirdha produced the documents such as copy of letter of M/s. Divya Impex, Nerul, copies of shipping bill No.777612 dated 27.6.1997, invoice and packing list issued by M/s. Divya Impex and container terminal memo, copy of M/s. James Machintosh & Co a shipping agent etc.

6. The Officers with panchas and Anup Mirdha thereafter, rushed to Sewree Timber Pond (Hereinafter referred to as ‘STP’), shed NO.4. At about 2.00 p.m. on 1.7.1997 they located the container. The said container was identified on the basis of the documents. The said container was opened & from it 8 pallets (bundles) of commercial plywood, each pallet containing 35 sheets were removed. The D.R.I. Officer marked the pallets as A to H and they were dismantled one by one. On dismantling pallet marked "C" the officers after removing the first five sheets

noticed a cavity upto the depth of 25 sheets. The remaining 5 sheets at the bottom were in intact condition. From this cavity D.R.I. Officers recovered 8 gunny bags which they marked I to VIII and one polythene bag which was marked IX. The gunny bags and polythene bag was opened in which greyish coloured tablets of identical colour and size were noticed. On test with the help of field testing kit, they answered positive for methaqualone. All the samples were marked, signed by panchas, Anup Mirdha and D.R.I. Officers. Shri.Petkar P.W.23, a Gazetted Officer was present while activity of seizure and panchnama of seizure was in progress. After removing samples 134.900 kg. of Mandrax Tablets was put in a Galvanized trunk, which was locked. The lock was wrapped with cloth and D.R.I. seal with identification tag was affixed thereon. The officers in the reasonable belief that the Methaqualone tablets and plywood sheets were being illegally exported out of India, took charge thereof.

7. In the statement of P.W.21 Anup Mirdha employee of M/s. Pramanik Exim Services recorded on 1.7.1997, it was revealed that accused no.1 Krishna Shetty from M/s. Divya Impex handled the documents of the said consignment for custom passing purpose, under the

garb of export of commercial plywood in factory stuffed Central Excise sealed container. Accused No.1 Krishna Shetty is known to Anup Mirdha being shipping agent and partner in M/s.Ravi Shipping. Based on the documents P.W.21 Anup Mirdha prepared shipping bill and got it out of charge from Custom on 27.6.1997 and he collected bill of lading on 30.6.1997 from M/s.James Mackintosh & Co. (P) Ltd. He handed over the original copies of bill of lading along with customs attested invoice, packing list and G.R. etc. to Krishna Shetty (accused no.1) at his (CHA) office and that Krishna Shetty had personally come to collect the documents.

8. In the night of 1.7.1997 itself, statement of P.W.6 R.B.Singh (Transporter) was recorded. He stated that on the direction of Krishna Shetty (accused no.1) owner of M/s.Ravi Shipping Co., he supplied his truck to lift the container. The empty container was transported from Mulund to Bhivandi for the purpose of loading the container. The address at Bhivandi was given by accused no.1 Krishna Shetty as M/s. Divya Impex, Patel Compound, Opposite-NTC Yarn, near Oswal compound, Purna Village, Bhivandi. On the instructions of P.W.6 R.B.Singh, his driver P.W.28 Premchand Kumbhar and Cleaner P.W.8 Ramashankar

Jaiswal, lifted the said container from Bhivandi and brought it to STP. The container was off-loaded from the truck at S.T.P. IV and the driver Premchand handed over the documents at the office of accused no.1 Krishna Shetty.

9. Based on the statement of P.W.21 Anup Mirdha, immediately dragnet was spread to search accused no.1 Krishna Shetty. After he was found, summons were issued to him. Thereafter, enquiries were made with accused no.1 Krishna Shetty and his statement (Exhibit-44) came to be recorded on 2.7.1997. In the said statement he has stated about his role in the handling of the Mandrax consignment, floating of M/s. Divya Impex, keeping accused no.2 Gopal Mishra as frontman and taking godown of P.W.14 Tanaji Patil at Bhivandi on monthly rental of Rs.3900/- through broker Kirti Thakker. Accused no.1 in his statement, stated that as Mandrex was to be concealed in the plywood sheets, the plywood had to be cut to make space. Hence, accused no.1 engaged the services of a carpenter from Bhivandi and 50 sheets of plywood were cut from the centre and cavity was created for concealment of prohibited goods. At the time of cutting the plywood sheets for such purpose temporary electric power was supplied by P.W.14 Tanaji Patil

from his tea shop. On 21.6.1997 the tablets packet wrapped in gunny cloth and plywood sheets were arranged at Bhivandi. Accused no.1 stated that the plywood sheets were kept on the pallet frames and then 8 gunny bags and polythene bag wrapped roll containing Mandrex were placed in the cavity and other 5 full plywood sheets were kept on top ready for strapping and palletisation. These pallets were wrapped with plastic sheets. Thereafter the godown came to be locked. After the statement of Accused no.1 Krishna Shetty was recorded,on the next day i.e. on 3.7.1997, he came to be arrested.

10. The Officers recorded statement of P.W.12 Madhukar Keni Excise Superintendent, P.W.10 Smt.Geeta Krishnan Excise Inspector and P.W.11 Baburao Bhalerao Peon of Central Excise, Kalyan Division, Mumbai. In their respective statements, they have stated that accused no.1 Krishnanand Shetty had attended their office several times and that at his instance the documents of M/s. Divya Impex were scrutinised. The consignment was relating to Export of plywood sheets. The consignment was attended to by them. After packing of consignment in the container, Sepoy P.W.11 Bhalerao put party's bottle seal No.0356058 on the container. Excise seal was also put. At the time of packing, the represntative of Divya Impex was

present. P.W.12 Mr. Keni has identified the said representative as accused Krishnanand Shetty.

11. On 2.7.1997 D.R.I. officers visited the said godown belonging to P.W.14 Tanaji Patil. Tanaji Patil informed the officers that the godown belongs to him and he has leased out the godown to one Shetty at Rs.3900/- per month. Tanaji Patil did not have the contact number of Shetty. Officers showed search warrant to Tanaji Patil. In the search of the godown the Officers found 4 lots of plywood sheets which they marked A,B,C and D. However, nothing incriminating was found except that 25 plywood sheets had neatly cut cavity in the centre of the sheets. It was similar to the cuts in the sheet of pallets which was marked "C" in the container and which was seized on 1.7.97 from STP. In the pallet marked ‘C’ in the cavity created by the cut in the centre Mandrex was found concealed. The D.R.I. Officers took charge of the 4 lots of plywood sheets found in the godown under panchnama and kept the same in the godown under seal. P.W.14 Tanaji Patil identified accused no.1 Krishna Shetty to be the same person to whom the godown was leased. Statement of P.W.14 Tanaji Patil was recorded on 2.7.1997. P.W.21 Anup Mirdha and P.W.6 R.B.Singh also identified accused

no.1 to be the person concerned with the export of plywood through Divya Impex.

12. On 2.7.1997 D.R.I. officers searched the premises of M/s. Ravi Shipping Agency, based on search warrant and collected 18 documents under panchnama. The said seizure took place in the presence of panchas. One of the panch was P.W.19 Vijay Sawant.

13. On the same day i.e. 2.7.1997 the D.R.I. Officer raided the premises at flat no.2, ground floor, building no.C-12, Sector-16, Phase-III, Nerul, Navi Mumbai and search warrant was shown to occupant P.W.31 Shashikant Bhosale. On Shashikant Bhosale being asked about accused no.2 Gopal Mishra, Shashikant informed that the flat belongs to his father Shahaji Bhosale (P.W.32) and that accused no.2 Gopal Mishra was staying with them since last three years as paying guest. He further stated that presently Gopal is not in Mumbai as he has left for his native place in Bihar to attend religious rites of his younger brother who died on 14.5.1997 in a train accident at Kurla, Mumbai.

14. The accused no.2 was not found at any of his

addresses or at his Nerul address. However, on 21.7.1997 accused no.2 appeared before D.R.I. officers and informed that he had gone to his native place in May, 1997 and hence, he was not available till then. In his statement dated 21.7.1997, accused no.2 Gopal Mishra stated that he stayed with P.W.32 Shahaji Bhosale on payment of Rs.1000/- to Rs.1200/- per month and that he was working with accused no.1 Krishna Shetty, in M/s. Ravi Shipping Agency on monthly salary of Rs.2250/-. He handled export documents along with Krishna Shetty. Accused no.2 Gopal Mishra further stated that Krishna Shetty told him to open one firm in his name which was opened in the name of M/s. Divya Impex, operating from his residential address at Nerul. He also stated that he opened bank account and Krishna got some papers signed by him pertaining to Import Export Code, R.B. Code and other bank formalities. Accused no.2 Gopal Mishra stated that he was not aware about the nature of the documents but he used to sign on the documents brought by accused no.1 Krishna Shetty. He stated that he had also signed blank cheque book and handed over the same to Krishna Shetty. Accused no.2 Gopal Mishra accepted his signature on the Export documents. However, he stated that he does not know other details of invoice/packing list as the same

were typed by Krishna Shetty, after obtaining his signature on blank forms. Accused no.2 was arrested on 21.7.1997.

15. P.W.8 Ramashankar Jaiswal the cleaner of truck MH-04-C-6138 has stated about his visit to Godown at Poorna village in Bhivandi. He took empty container in his truck to the said godown. The container was loaded with plywood at the godown. He has stated about presence of accused No.1 Krishna Shetty at the godown and handing over export documents by Krishna Shetty to the driver P.W.28 Premchand Kumbhar and this witness.

16. On 3.7.1997 D.R.I. Officers searched flat no.29, 3rd floor, Guruprasad Co.Op. Housing Society, Chembur which was owned by Chandrakant Ambalal Dalal. It was revealed that accused no.1 was residing in this flat after his marriage. Chandrakant Dalal confirmed about Krishna Shetty keeping his belongings and about staying in the said house with his family. In the search the officers seized some documents under panchnama and photograph of marriage reception of Krishna Shetty.

17. The statements of various persons concerning supply of truck, supply of container and supply of

plywood sheets were recorded.

18. On the basis of address given by Krishna Shetty (accused no.1), the premises of Umesh Shetty (accused no.3) was visited. However, it was found locked.

19. One set of 9 samples of the Mandrax tablets was sent to Dy.Chief Chemist and on chemical analysis the Deputy Chief Chemist, has certified that sample contains methaqualone, a psychotropic substance, covered by section 2(xxiii) of the N.D.P.S.Act.

20. After completion of investigation, complaint against the accused nos.1 and 2 was filed on 29.9.1997.

21. The officers made efforts to contact accused no.3 Umesh, however, he could not be traced. Based on specific intelligence a search warrant was obtained and the premises of accused no.3 Umesh Shetty was searched on 30.4.1998. He came to be found, panchnama of search, seizure was drawn. Accused no.3 Umesh Shetty was brought to the office. His statement was recorded (Exhibit-112). In his statement, accused no.3 Umesh Shetty has stated that his wife had informed him about visits of D.R.I.

officers and about leaving summons at his residence. But he did not attend on legal advice. He identified the photograph of accused no.1 to be that of Krishna Shetty who is married to his cousin sister Malini and as such, he is his brother-in-law. Accused no.3 Umesh stated that Krishna put up proposal before him to export Mandrax Tablets in export consignment of plywood and requested accused no.3 for finance on interest. Accused no.3 asked accused no.1 about the things to be exported and in June, 1997 Krishna Shetty took him to the godown at Bhivandi where accused no.3 Umesh Shetty saw huge quantity of Plywood and 9 bags i.e. 8 gunny bags, and one polythene bag of Mandrax Tablets. Krishna Shetty (accused no.1) told accused no.3 Umesh that money given by him, has been invested by him in the export consignment. It is the prosecution case that accused no.3 Umesh Shetty thus gave financial assistance to accused no.1.

22. After his statement was recorded, the accused no.3 came to be arrested on the very same day i.e. on 30.4.1998 and remanded to judicial custody. The complaint against accused no.3 Umesh Shetty came to be filed on 27.7.1998.

23. The charge (Exhibit-2) was framed against the accused Nos.1 and 2 on 16.4.1998. They pleaded not guilty and claimed to be tried. At that time accused No.3 was not arrested and no complaint against him had been filed. After accused No.3 was arrested and the complaint against him came to be filed, charge (Exhibit-5) was framed against him on 23.9.1998. He pleaded not guilty to the said charge and claimed to be tried. However, later on a common charge (Exhibit-9) came to be framed against all the three accused on 23.9.1998. Vide Exh.9 they were all charged under Sections 29 read with 8(c), 22 and 23 of the N.D.P.S.Act, Section 22 read with 8(c) and 29 of the N.D.P.S.Act, under Sections 28 read with section 23 and 8(c) and 29 of the N.D.P.S.Act. Vide Exhibit-9/A, an additional charge was framed against accused no.3 Umesh Shetty under Section 27-A read with 2 (viii a) (iii) of the N.D.P.S.Act. All the accused pleaded not guilty to the said charges. Their defence is that of total denial and false implication.

24. After considering the evidence led by the prosecution and after considering the submissions made before the learned Special Judge, the learned Special Judge convicted and sentenced the original

accused nos.1 and 3 as recorded in para no.1 of this judgment. However, accused no.2 Gopal Mishra came to be acquitted of all the charges. Being aggrieved by the said judgment and order, accused no.1 Krishnanad Shetty preferred Criminal Appeal No.388 of 2000 and accused no.3 Umesh Shetty preferred Criminal Appeal No. 281 of 2000. Against the order of acquittal of the accused no.2, the D.R.I. authorities have preferred Criminal Appeal No.567 of 2000. The D.R.I. authorities had also preferred Criminal Appeal No. 566 of 2000 for enhancement of sentence awarded to accused No.3 Umesh Shetty. However, the said appeal came to be dismissed by this Court, by order dated 12.3.2001.

25. During the trial, in all the prosecution has examined 52 witnesses.

(i) P.W.1 is Senior Intelligence Officer Mr.Daherkar, P.W.51 Mr.Rana Joint Director and P.W.52 Shri.Dixit Assistant Director, D.R.I.. These witnesses have narrated about the receiving of intelligence and follow up action.

(ii) P.W.2 Mr.Sukhpalsingh Dhani is the Investigating Officer and Intelligence Officer of D.R.I.. P.W.3

Mr.Vinod Tolani, P.W.43 Mr.Petkar are the Intelligence Officers who state about the activities of search and seizure of the container in which Mandrex was found on 1.7.1997. P.W.43 Mr.Petkar has also deposed relating to the search of premises of accused no.1 Krishnand Shetty on 2.7.1997. P.W.47 Mr.Parmar has also deposed relating to the seizure and recovery of Mandrex tablets. P.W.13 Sopan Gunjal is the panch relating to the said search and seizure. P.W.21 Anup Mirdha is the representative of CHA M/s. Pramanik Exims Services Pvt.Ltd. who was present during the said search and seizure. Accused no.1 Krishnanad Shetty had engaged CHA M/s. Pramanik for exporting the plywood consignment. P.W.49 Pramanik was the employer of P.W.21 Anup Mirdha.

(iii) P.W.15 Mr.Murthi, P.W.16 Mr.Devikumar Shetty, and P.W.18 Mr.Yellapurkar are Intelligence Officers who recorded the statements of various witnesses. P.W.17 Prakash Manpuria and P.W.34 Hemant Bankar are examined on the point of acquisition of plywood sheets.

(iv) In relation to the renting of godown at Purna village in Bhiwandi by accused No.1 Krishna Shetty, P.W.14 Tanaji Patil, P.W.23 Pravin Thakkar and P.W.27

Anil Mhatre have been examined. The other witnesses who deposed about the events at the said godown are P.W.20 Mr.Bharat Vora, P.W.44 Mr.Joseph and P.W.48 Mr.Naik. P.W.10 Inspector of Central Excise Mrs.Geeta Krishnan, P.W.11 Mr.Bhalerao Peon, Central Excise and P.W.12 Superintendent, Central Excise Mr.Keni also visited the godown. They have inspected the plywood sheets in which the bags of Mandrex were found concealed, which were meant for export and issued certificate.

(v) P.W.6 Ramraj Singh, P.W.26 Dinesh Singh who is the son of P.W.6 Ramraj Singh, P.W.8 Ramashankar Jaiswal, the cleaner of the truck, P.W.28 Premchand Kumbhar the driver of the truck, P.W.45 Mrs.Kapadia and P.W.7 Najib Kadri have deposed about the supply of truck No.MH-04-C-6138 and container. The consignment of Mandrex concealed in the plywood sheets, was transported from the godown at Bhivandi to STP in the said container and truck.

(vi) P.W.38 Umesh Shetty, P.W.41 D’Souza are the panch witnesses relating to the search of the premises of accused no.1 Krishnand Shetty. Both these witnesses have turned hostile. Their evidence is of no use to the prosecution. However, prosecution has examined the Intelligence Officer

Mr.Krishna Narayan Swami who has deposed on the above aspect.

(vii) P.W.25 Salil Anand, P.W. 29 Bhanushali, P.W.30 Pandya, P.W.35 Bodade, P.W.37 Gopale, P.W.46 Suryanarayan have deposed about the previous transaction of supply of containers to accused no.1 Krishna Shetty.

(viii) P.W.9 D.R.I.Officer Mr.Milind Gholap visited Kalva Belapur Sahakari Bank Ltd., Nerul branch, wherein the account of Divya Impex was opened and he has searched the premises of accused no.2 Gopal Mishra. P.W.50 Deshmukh is the bank employee in the said bank.

(ix) P.W.31 Shashikant Bhosale and P.W.32 Shahaji Bhosale are the witnesses in whose house accused No.2 Gopal Mishra was residing.

(x) P.W.33 Surendra Shetty and P.W.36 Amin are the panch witnesses in respect of search of the premises of accused no.3. P.W.3 Mr.Tolani was present at the time of search of house of accused no.3. He also recorded statement of accused no.3.

(xi) P.W.4 Mr.Gaikwad, P.W.24 Mr.Jadhav and P.W.40 Mr.Dalal are the panch witnesses who have deposed about the search and seizure of Gurukrupa building at Chembur on 3.7.1997.

(xii) P.W.39 Ganeshprasad who was a security guard in B.P.T. was examined in respect of whereabouts of Someshwarsingh.

(xiii) P.W.19 Vijay Sawant is the panch relating to seizure of 18 documents from the table of accused no.1 Krishna Shetty in M/s. Ravi Shipping wherein accused no.1 Krishna Shetty was a partner. P.W.5 Ratansen Singh is the partner of M/s. Ravi Shipping wherein the accused no.1 Krishna Shetty was also a partner. P.W.47 Intelligence Officer Mr.Parmar has also deposed on the above aspect.

(xiv) P.W.35 Superintendent of Customs Mr.Bodade has placed on record the certificate Exhibit-206 relating to destruction of Mandrex tablets and P.W.42 the Superintendent of Customs Mr. Meena has deposed about depositing of 335 sheets of plywood in the warehouse.

26. We have heard the learned counsel appearing for

the parties. We have also perused the entire material on record including the judgment and order. After giving our anxious thought to the same we have come to the conclusion that Criminal Appeal No. 388 of 2000 and Criminal Appeal No. 567 of 2000 deserve to be dismissed, whereas criminal Appeal No. 281 of 2000 deserves to be allowed.

27. Now we shall proceed to examine the evidence against each of the accused individually. Firstly, we shall take up the evidence against accused no.1 Krishna Shetty. From the evidence of panch witness P.W.13 Gunjal and evidence of P.W.2 Sukhpalsingh Dhani, P.W.21 Anup Mirdha and P.W.23 Mr.Petkar, it is clear that on 1.7.1997, 139.9 kgs of Mandrex came to

be seized from container No.TEXU-325433 at STP. The said Mandrex was hidden in sheets of plywood which had been cut in the centre. The plywood was being exported by Divya Impex.

28. The evidence which connects the appellant-accused no.1 Krishna Shetty with the said consignment of Mandrex which was to be exported is as follows:-

(i) P.W.14 Tanaji Patil who was owner of a godown situated in survey no.146 at village Purna in Bhiwandi, has stated that accused no.1 Krishna Shetty required a godown. Krishna Shetty informed him that he would be storing plywood in the godown. Thereafter, he has stated that Krishna Shetty used to come for storing of the said material. On one occasion, Krishna Shetty brought a carpenter for cutting the plywood sheets. The carpenter had got electric cutter for cutting for which Krishna Shetty needed electricity. Electricity was provided by this witness from his Tea-stall as there was no electricity supply in that godown. Tanaji Patil noticed the carpenter cutting the plywood sheets. Tanaji Patil has specifically deposed that plywood sheets were cut at the centre. After the work was over, Krishna Shetty used to close the door of the godown and he used to lock it. The keys of the godown were with accused no.1 Krishna Shetty. After two months, the Customs Officers came to his godown. On the instructions of the Officers, the godown came to be opened. The officers searched the godown and prepared panchnama. In the godown plywood sheets were found stacked in groups. One bundle (pallet) of plywood sheets was found cut in the centre i.e. there was a cavity in one of the pallets. The hole

(cavity) was noticed after opening the plywood sheets and separating them. Thereafter, the godown came to be sealed by the Officers. Witness Tanaji Patil has identified accused no.1 Krishna Shetty as the person who had taken his godown on rent.

(ii) Accused no.1 Krishna Shetty was residing in Mumbai. There is no reason why the witness from Bhiwandi in District Thane, would implicate accused no.1 Krishna Shetty unless this witness had actually witnessed the events as deposed by him. There is nothing to show that this witness had any axe to grind against accused no.1 Krishna Shetty to falsely name him and implicate him.

(iii) The evidence of P.W.14 Tanaji Patil that he had rented his godown to Krishna Shetty is corroborated by the evidence of P.W.23 Pravin Thakkar. Witness Thakkar has stated that he knows Krishna Shetty (accused no.1). He has stated that Krishna Shetty and he went to the office of one Kirtikumar. Kirtikumar and Krishna Shetty had discussion about the availability of godown. Thereafter, accused no.1 Krishna Shetty engaged godown of Tanaji Patil (P.W.14) situated at village Purna. It may be stated here that Kirtikumar i.e. the Estate Agent had

expired pending the trial. Hence, he could not be examined.

29. P.W.21 Shri.Anup Mirdha was working as Clearing House Agent. (Hereinafter referred to as 'CHA'). Witness Anup Mirdha has stated that in 1997, he was working with M/s. Pramanik Exims Services Pvt.Ltd. M/s. Pramanik Exims Services Pvt. Ltd. are the customs house agents and their duty included customs clearance for export and import. Anup Mirdha has stated that on behalf of M/s. Pramanik Exims Services Pvt.Ltd. he handled exports of consignment of exporters. During his tenure with M/s.Pramanik Exims Services Pvt.Ltd., he handled consignment of M/s. Divya Impex. He used to receive the papers/ documents of export consignment of M/s.Divya Impex from accused no.1 Krishna Shetty. In respect of consignment of plywood in which the Mandrex was concealed, Mr.Mirdha has stated that documents relating thereto were received from Krishna Shetty accused no.1. Mr.Mirdha has stated that when the container in question was opened at STP on 1.7.1997 they noticed eight pallets (bundles of plywood sheets). The Officer checked the pallets one by one. In one of the pallets, the Officers noticed a cavity and in the said cavity there were gunny bags. The

cavity was found after some plain sheets of plywood were removed and there were similar plain sheets at the bottom of the pallet. The cavity was noticed only on removing the sheets at the top. The DRI Officers took out the bags and found tablets in the bags. The DRI Officers were having drug identification kit. They tested few tablets on that kit and they informed him that the tablets were Mandrex tablets. The DRI Officers took out samples from the bags. Thus, the evidence of Anup Mirdha shows that it was the accused no.1 Krishna Shetty who had handed over to him the documents in relation to the plywood consignment in which the Mandrex was concealed.

30. P.W.6 Ramraj Singh is carrying on business in the name and style as R.B.Containers & Movers at Mumbai. This witness has stated that he possessed two trucks for his business having Nos. MH-04/C-6138 and MH-04/C-6139. In June, 1997 he had provided truck No.MH-4/C-6138 to accused no.1 Krishna Shetty for transportation. The witness has identified accused no.1 Krishna Shetty in Court. Witness Ramraj has stated that on 23.6.1997 accused no.1 Krishna Shetty telephoned him that an empty container is to be transported from Mulund to Bhiwandi and the

delivery order thereof is in his office (Krishna Shetty's office) and to collect the same. Witness Ramraj had personally gone to the office premises of accused no.1 Krishna Shetty for collecting the delivery order. He has stated that the said office is situated at Karnak Bunder. At the time when witness Ramraj collected the delivery order, he was given the address at Bhiwandi where the container was to be carried. This address was given by Ramraj Singh to his driver Premchand Kumbhar (P.W.28). Accordingly, on 23.6.1997 his driver Premchand Kumbhar collected the empty container from Mulund and took it to Bhiwandi. On 24.6.1997 the goods were stuffed in the container at Bhiwandi. Thereafter, the customs seal was put on the container. After that driver Premchand transported the container to Fare Bassain in B.P.T. area in Mumbai along with documents. Witness Ramraj received telephone call from his driver that the container is not decamped at Fare Bassain hence, witness Ramraj telephoned accused no.1 Krishna Shetty and enquired with him. Accused no.1 Krishna Shetty informed him that container was to be decamped at STP. Thereafter, the driver kept the container at STP and came back to the office and handed over the documents to him. Witness Ramraj has stated that cleaner of the said truck was P.W.8

Ramshankar Jaiswal. As far as P.W.6 Ramraj Singh is concerned, accused no.1 Krishna Shetty has admitted in his statement under Section 313 of Cr.P.C. that he gave him (P.W.6) business. In respect of witness P.W.6 Ramraj stating that he had gone to the office of accused no.1 Krishna Shetty to collect the delivery order, the accused has stated that he does not remember whether this witness has come to his office to collect the delivery orders. However, accused no.1 Krishna Shetty has admitted in his statement under Section 313 of Cr.P.C. that this witness used to come at Karnak Bunder i.e. the place where the office of Ravi Shipping is situated. Nothing has been brought out in the cross examination of P.W.6 Singh so as to disbelieve him.

31. The evidence of P.W. 6 Ramraj Singh is corroborated by the evidence of P.W.28 Premchand who was driver of the said truck and P.W.8 Ramshankar Jaiswal who was the cleaner of the truck. Premchand was the driver of Truck No. MH-04/C-6138. Premchand has stated that he used to drive the said truck. The owner of the said truck was witness Ramraj and Ramshankar Jaiswal was the cleaner of the said truck. On 23.6.1997 he took the said container and truck from Mulund to the address given to him at Bhiwandi.

At the said address, the container was stuffed. Thereafter, it was sealed. Witness Premchand checked the seal and on finding it intact, he took the container and truck to Fare Bassain. At the said place, the container was not removed from the truck, hence, he telephoned his office. His employer P.W.6 Ramraj informed him to take the container to Sewree at STP and that the container will be removed at STP.

32. P.W.8 Ramshankar Jaiswal was the cleaner of the truck No. MH-04-C-6138. He has stated that he was working as cleaner on said truck belonging to P.W.6 Ramraj Singh. Premchand was the driver of the said vehicle. On 23.6.1997, a container was picked up from Mulund and carried in the truck to Bhiwandi. They carried the container to Purna village in Bhiwandi on the address given to them. When they reached the said place, the godown was closed. Hence, they parked the vehicle there. On the next day i.e. on 24.6.1997 the godown was opened. Thereafter, the goods i.e. plywood was packed with iron strips and loaded into the container and then in the truck. After stuffing the goods in the container, the seal was put. Thereafter one person i.e. accused no.1 Krishna Shetty came and handed over some papers to them concerning goods which were

loaded. The truck was taken to Fare Bassain Bunder. Thereafter, they contacted their employer who had directed them to off-load the container at STP. Accordingly, the container was offloaded by them. The statement of P.W.6 Ramraj Singh is also supported by the evidence of P.W.26 Dinesh Singh who is the son of P.W.6 Ramraj. He has stated that on 23.6.1997 on the direction of his father, he collected the delivery order and address. Premchand the driver and Ramshankar the cleaner respectively brought the trailor at the Mulund yard. He showed the order to the concerned authorities at Mulund and lifted an empty container. The container was put on their vehicle Thereafter, the driver and cleaner proceeded with the container to the address at Bhiwandi.

33. P.W.16 Devikumar at the relevant time was the manager of East-Coast Timber Pvt.Ltd. at Tallappa, Dist. Shimoga. He has stated that he received the orders from M/s. Divya Impex of Mumbai for commercial plywood having size of 7 feet x 4 feet x 18 mm. He had received two orders from M/s. Divya Impex on telephone. One of the dispatch was of 285 sheets in June 1997. P.W.34 Hemant Bankar was plywood manufacturer carrying on business at Manglore. He has stated that he issued supply order

of plywood sheets in the name of M/s.Divya Impex of Bombay. The said orders were received telephonically from accused no.1 Krishna Shetty. He has stated that prior to receiving the telephone call, he knew accused no.1 Krishna Shetty and he has identified the

appellant-accused no.1 as being Krishna Shetty. The order of supply was for one full truck load of plywood sheets. He has received such orders twice. On reading the evidence of both P.W.16 Devikumar and P.W.16 Hemant Bankar, it is clear that in June, 1997, a truck load of plywood sheets was sent to Divya Impex on the order being placed by accused no.1 Krishna Shetty. It is pertinent to note that size of the plywood which was sent by these witnesses and size of the plywood in which the consignment of Mandrex was found concealed, is the same.

34. Though the accused no.2 Gopal Mishra has been shown to be the proprietor of Divya Impex, from the evidence on record, it is clear that he was only a front and actually accused no.1 Krishna Shetty was running the said concern. Besides the evidence discussed above which points out to accused No.1 Krishna Shetty as being the person who was running Divya Impex this fact is also clear from the

statement of accused no.1 Krishna Shetty. Gopal Mishra was working in the firm of Ravi Shipping as a clerk for the last one year prior to 1.7.1997 and he was paid salary of Rs.2500/- per month. Accused no.1 Krishna Shetty was the partner in Ravi Shipping Agency. Krishna Shetty got a firm in the name of Divya Impex floated in the name of Gopal Mishra using the residential address of Gopal Mishra as office address of Divya Impex. It is pertinent to note that in the raid conducted on 2.7.1997 at the office of Ravi Shipping, in the table space, which was being used by accused no.1 Krishna Shetty, the documents relating to Divya Impex were found. P.W.19 Vijay Savant is the panch witness, who has deposed about the seizure. The panchnama of the said seizure is at Exhibit 130. Mr.Vijay Savant was then working as an Accountant in International Cargo Clearing Services Mumbai. He has stated that the export department of Ravi Shipping was looked after by accused no.1 Krishna Shetty and he was assisted by Gopal Mishra.

35. P.W.5 Ratansen Singh who was one of the partners of Ravi Shipping in which accused no.1 Krishna Shetty was the partner, has corroborated the evidence of panch witness P.W.19 Vijay Sawant on the above aspect. P.W.5 Ratansen Singh has stated that he

along with four other persons including accused no.1 Krishna Shetty were partners in Ravi Shipping. On 2.7.1997 DRI Officers came to their office with two panchas. The DRI Officers showed them search warrant for searching the office premises. Thereafter, the office premises came to be searched. The DRI Officers found some papers in drawer of the table which was occupied by accused no.1 Krishna Shetty. The said papers were concerning Divya Impex. As far P.W. 5 Ratansen Singh is concerned, accused no.1 Krishna Shetty has admitted in his statement under Section 313 of Cr.P.C. that P.W.5 Singh, he (accused no.1) and three others had formed the partnership firm. There is nothing in the evidence of P.W.5 so as to disbelieve him. No reason has been furnished by accused no.1 Krishna Shetty as to why P.W.5 Singh would falsely involve him. There is nothing on record to show that there was any enmity between the parties or that P.W.5 Singh had any grudge against accused no.1 Krishna Shetty so as to falsely implicate him. Thus, we find the evidence of this witness to be consistent, reliable and trustworthy.

36. It is pertinent to note that no papers relating to Divya Impex were found in the house of accused no.2 Gopal Mishra but the papers relating to Divya

Impex were found in the drawer of the table used by accused no.1 Krishna Shetty of Ravi Shipping wherein he was partner and some documents relating to Divya Impex were found at the residence of accused no.1 Krishna Shetty. On 2.7.1997 P.W.43 Aziz Petkar searched the residential premises of accused no.1 Krishna Shetty at Jacob Circle, Shirin Manzil and panchnama Exhibit-72 came to be drawn. During the said search, documents relating to Divya Impex came to be found in the house of accused no.1 Krishna Shetty. P.W.22 Intelligence Officer Krishna Narayanswamy was present at the time of search at Jacob Circle. No doubt panch witnesses relating to the said search and seizure i.e. P.W.38 Umesh Shetty and P.W.41 Wilfred D'Souza have turned hostile. However, on going through the evidence of P.W.22 Intelligence Officer Krishna Narayanswamy and P.W.43 Aziz Petkar, we find no reason to disbelieve their testimony on this aspect. Testimony of these witnesses has remained unshaken. The Supreme Court in the case of **P.P.Fathima Vs. State of Kerala reported in 2004 SCC (Cri.) 1** has observed that "if the panch witness does not support the prosecution, it is not fatal to the prosecution as the evidence of the seizing authority and other material can be relied upon if the Court is satisfied that the

seizure was genuinely made."

37. Moreover, it may be noted that accused no.1 Krishna Shetty in his second statement dated 16.9.1997 has admitted that documents pertaining to Divya Impex were seized from his residential premises at Shirin building, Jacob Circle by the officers of DRI and the firm was handled by him from his firm M/s. Ravi Shipping. He has admitted that documents relating to Divya Impex were brought by him from his office to his residence. From the statement of accused no.1 Krishna Shetty dated 16.9.1997, it is clear that the correspondence of Divya Impex was also carried out as per his instructions. It is pertinent to note that this statement dated 16.9.1997 has not been retracted by accused no.1 Krishna Shetty. From the above facts and from the evidence of P.W.6 Ramraj Singh, P.W.21 Anup Mirdha, P.W.8 Jaiswal, P.W.12 Keni, P.W.28 Premchand, P.W.34 Bankar and the statement of accused No.2 Gopal Mishra, it is clear that though the firm Divya Impex stood in the name of Gopal Mishra, the entire business was being carried out by accused no.1 Krishna Shetty.

38. One clinching piece of evidence which clearly connects accused no.1 Krishna Shetty with the

consignment in which the Mandrex was concealed, is the evidence of P.W.12 Madhukar Keni who was the Superintendent of Excise. Mr.Madhukar Keni has stated that on 20.6.1997 accused no.1 Krishna Shetty telephoned him and informed him that there would be export in the next week. The export would be in the name of Divya Impex. On 24.6.1997 accused no.1 Krishna Shetty again telephoned him in the morning and informed him that there is export on that day. Madhukar Keni asked accused no.1 Krishna Shetty to bring all papers relating to export. Accordingly, representative of accused no.1 Krishna Shetty brought all the aforesaid papers which included invoices and packing list, to his office along with customs permission. Thereafter, this witness along with P.W.10 Mrs.Geeta Krishnan visited the godown of Divya Impex at village Purna in Bhiwandi. When they visited the godown, they found eight pallets of plywood in the said godown and near the said godown one container was standing on a truck. He directed P.W.10 Mrs.Geeta Krishnan to examine one of the pallets of plywood sheets. They counted number of sheets, length and width of the plywood sheets. Each of the pallets was containing 35 sheets of plywood. Then they directed accused no.1 Krishna Shetty to pack pallets with iron strips and they told accused

no.1 Krishna Shetty to load all the eight pallets to be packed in the container. At that time, one Sepoy P.W.11 Bhalerao was with them. Thereafter, they asked accused no.1 Krishna Shetty to shut the door of the container and asked P.W.11 Bhalerao to put the central excise seal. After that Divya Impex also produced their bottle seal which were also put on container. This very container which was loaded on truck No.MH-04/C-6138 was off-loaded at STP and it was in this container itself that the Mandrex was found concealed in the cavity cut in the sheets of plywood. There is no material to show that the seal of Central Excise or that of Divya Impex had been tampered before the container was opened at STP. In fact P.W.21 Anup Mirdha an independent witness, has stated that before opening the containers at STP the seals were intact.

39. The learned counsel for the accused no.1 Krishna Shetty has submitted that the consignment which was opened by the DRI Officers was not the very same consignment which had been sent by Divya Impex. It has been submitted that the concerned shipping bill number is 777612 dated 27.6.1997. The information received by the Officers of DRI more specifically P.W.1 Daherkar was that the consignment of commercial

plywood was to be exported to DIJIBOOTI in Africa by M/s. Divya Impex, Nerul, New Mumbai. The plywood consignment is stuffed into container No.TEXU-325433-2 and is covered by shipping bill No.777612 dated 27.6.1997. The information further was that methaqualone tablets were concealed in the said consignment of commercial plywood in container TEXU-325433. The learned advocate for the accused has submitted that infact, the officers have searched for container covered under shipping bill no.77612 dated 25.6.1997. In support of this contention, he has relied upon the evidence of P.W.2 Sukhpalsingh. P.W.2 Sukhpalsingh is the Intelligence Officer who was present at the time of search and seizure of the container of plywood and the Mandrex tablets. Reliance is placed on paras 2 to 4 of the evidence of P.W.2 Sukhpalsingh, wherein he has stated that he was told to make enquiries regarding CHA who handled shipping bill No.77612 dated 25.6.1997. Thus, it was submitted that enquiries were made in relation to a wrong shipping bill and therefore, the accused were not concerned with the consignment in which the Mandrex was found. In this connection, it is pertinent to note that no doubt, P.W.2 Sukhpalsingh may have mentioned the shipping bill No. as 77612 dated 25.6.1997 in para nos.2 to 4, however,

thereafter, this witness P.W.2 has mentioned the correct number and date in para no.7 of his evidence. It clearly appears that the earlier bill number and date which has appeared in the earlier paras of his evidence, may be due to typing mistake or due to lapse of memory. In any event, the container number remains constant i.e. TEXU-325433-2. P.W.21 Anup Mirdha has specifically stated that they identified the container due to its number only. The container was of Shipping Company James Mackintosh. No submission has been made before us that the container was inconsistent. One other factor which is to be noted is that the said container had seals of customs excise department as well as one seal put by Divya Impex. Therefore, there is no question of the wrong container being searched. Thus, there is no confusion relating to the identity of the container in which Mandrex tablets were found being that of Divya Impex.

40. There can be no confusion in respect of consignment or in relation to the identity of the container in which the Mandrax was found for one more reason. This is so because the panchanama Exh.21 in relation to the search and seizure of the container at STP, clearly shows that the shipping bill number

is 777612 dated 27.6.97 of M/s. Divya Impex, Nerul, New Mumbai. The invoice relating to the said consignment is issued by M/s. Divya Impex. The packing list in relation to the consignment has been issued by M/s. Divya Impex. When the container was located at STP it was found to have the Central Excise lead seals and one bottle sealing bearing No. 56358. These seals were broken and thereafter, the contents of the container were offloaded and in one of the eight pallets the Mandrax was found. It is pertinent to note that the seals i.e. articles 4 and 4-A which were on the container and which were broken during the search and seizure, were put in the presence of P.W.10 Mrs. Geeta Krishnan who was the Inspector of Central Excise, P.W.11 Bhalerao and in the presence of P.W.12 Mr. Keni, Superintendent of Central Excise. The seals were that of the Central Excise and the bottle seals of the exporting party. These three witnesses have identified those seals. Both P.W.10 Inspector Mrs. Geeta Krishnan and P.W.12 Superintendent Mr. Keni had signed on the invoices pertaining to the said consignment. On the reverse of the invoice, container number and Central Excise seal number were mentioned. Below it P.W.10 Inspector Mrs. Geeta Krishnan put her endorsement and rubber stamp of her designation which was also

signed by P.W.12 Superintendent Mr. Keni. Both P.Ws. 10 and 12 have deposed on this aspect. P.W.12 deposed that the bottle seal which he identified was the very same which was given by Krishna Shetty and it was put to the container before this witness. Moreover, P.W.21 Anup Mirdha an independent witness has also stated that he can identify the seals Article 4/4-A i.e. excise seal and bottle seal from the documents. In view of all these facts there is no merit in the contention that a wrong consignment was opened.

41. The learned advocate for accused no.1 has submitted that it would have been impossible for him or anyone on his behalf to conceal nine gunny bags containing Mandrex in one of the eight pallets of plywood. He has submitted that officers of the Central Excise were present all throughout and thus, in their presence, it would not have been possible for the accused to place Mandrex in the plywood sheets. In this connection, it is to be noted that all the eight pallets were not physically checked by the Excise Officers by separating plywoods and only one pallet out of eight pallets was thoroughly checked by separating the plywood sheets. As per the Rules, the officers are only required to check 10% of

the consignment which they had complied with. Moreover, from the evidence of P.W.12 Mr. Keni, it is clear that he had left for his office to process the papers further and to put stamps and seals of central excise office. P.W.10 Smt. Krishnan has stated that when they were at their office, they (P.W.10 and P.W.12) received message that stuffing was completed and hence they went to godown. From the evidence of P.W.10 Smt. Krishnan it has also come on record that office of the central excise was at a distance of 18 to 20 minutes by autorickshaw from the godown. Thus, it is clear that for at least a period of one hour both the officers were not present at the godown. This being a normal procedure that the officers were required to go to their office to process the papers further and to put the stamps and seals of their office, would be known to the accused no.1 and thus, he could take advantage of the same.

42. Thereafter, it was submitted on behalf of accused that P.W.10 Mrs.Geeta Krishnan has stated that they had selected one pallet and thoroughly examined the same but thereafter they have checked remaining pallets for detecting any kind of hollowness. It was submitted that if at all, the

plywood sheets which were loaded from the godown at Bhiwandi were cut in the centre, a hollow sound would have been heard by the officers of Central Excise. P.W.10 Mrs.Geeta Krishnan has specifically stated that the pallets were checked for hollowness. In this connection, it is important to note that each of the eight pallets i.e. bundles of plywood consisted of 35 sheets each. As per the Rules, the officers of Central Excise were only supposed to check 10% of the consignment. This has come on record in the evidence of P.W.10 Smt. Krishnan. Accordingly, only one pallet was thoroughly checked by the officers of Central Excise i.e. P.W.10 Mrs.Geeta Krishnan and P.W.12 Mr.Kini. All the plywood sheets were not cut but top five plywood sheets and five bottom sheets were kept intact and middle 25 sheets of plywood were cut in the centre. The plywood sheets were thus cut only in one of the eight pallets and in the cavity formed therein the Mandrex was stuffed. In such case, there would be no hallow cavity as the cavity had been filled with the Mandrex. In such case, there would be no question of any hollow sound being heard. It is clear that all the plywood sheets in all the eight pallets were not searched by the Excise Officers. P.W.10 Mrs.Geeta Krishnan has specifically stated that she was not present at the time of

stuffing so also P.W.12 Mr. Kini has stated that he was not present all the time in the godown as he had left the godown for going to his office for putting the seal on the documents. Thus, this submission made on behalf of the accused has no merit.

43. The learned counsel for the accused has submitted that though the information received was that the Mandrex and the plywood consignment was to be exported to DIJIBOOTI, the evidence on record shows that it was to go to Dubai. Thus, he submitted that there is inconsistency in relation to the port where the consignment was headed. Thus, the accused was not concerned with the consignment in which Mandrax was found. In view of this contention we have examined the documents relating to the export consignment which was seized under panchnama Exhibit-21. The said documents (Exhibit-22 Colly.) related to export of plywood consignment by Divya Impex. These documents clearly show that the consignment of eight pallets of 35 sheets each of commercial plywood of the size of 7 ft x 4 ft x 18 mm was being exported by Divya Impex of Nerul, Navi Mumbai. The consignee was M/s. Taj Mohammed, P.O.Box No.4548 Dubai, UAE. However, the port of dispatch is shown AS ‘DIJIBOOTI’ in Ethiopia. In the

said documents the factory address of the Divya Impex is shown as Purna Village, Bhiwandi, Thane. The container and the bottle seal numbers are also clearly mentioned in the said papers. Thus, from the shipping bill, it is clear that the consignee was someone in Dubai and the port of destination was DIJIBOOTI. Thus, it cannot be said that there was any confusion in relation to the identity of the container in which Mandrex was found.

44. In the present case, there is no serious challenge that mandatory provisions of the NDPS Act, have not been complied with. In the present case, there is no question of application of Section 50 of the NDPS Act as the Mandrex tablets were found concealed in plywood sheets which were kept in the container at STP. As the Mandrex were not found on the person of any accused, clearly Section 50 of the NDPS Act, is not attracted. Section 42 (2) of the NDPS Act would be attracted in the facts of the present case. However, on going through the evidence of P.W.1 Mr.Daherkar and P.W.52 the then Assistant Director of DRI, it is clear that provisions of Section 42(2) of the NDPS Act, have been complied with.

45. Besides all the evidence which has been discussed above, which shows the nexus of accused no.1 Krishna Shetty with the consignment of plywood in which Mandrex was being exported, there is one other piece of evidence which connects accused no.1 Krishna Shetty with the offence. This evidence consists of the confessional statements of accused no.1 Krishna Shetty which are at Exhibit-44 and Exhibit-81. The statement at Exhibit-44 is dated 2.7.1997 and the statement at Exhibit-81 is dated 16.9.1997. From these statements, it is clear that accused no.1 Krishna Shetty was directly involved in the export of Mandrex by concealing the same in the cavity made in plywood sheets. However, in respect of the said statements, the learned advocate for the accused no.1 has submitted that the said statements cannot be taken into consideration as they are hit by Article 20(3) of the Constitution of India. He has drawn our attention to the evidence of P.W.43 Intelligence Officer Mr.Petkar. This witness had gone to the residence of accused no.1 Krishna Shetty situated at Jacob Circle, Shirin Manzil. This witness has stated that on enquiry, brother of accused no.1 disclosed that accused no.1 Krishna Shetty is sleeping next door. Then brother of accused no.1 went and got accused no.1. P.W.43

Mr.Petkar asked accused no.1 Krishna Shetty to come along with him to his office. Based on this evidence, it is submitted that this shows that at his residence itself the accused No.1 was taken into custody by the Officers of D.R.I. It is submitted that this means that accused No.1 was arrested by this officer and hence, any statement made by him to the D.R.I. officers would be hit by Article 20(3) of the Constitution of India. The learned advocate for the accused has placed reliance on the decision in the case of **Ramanlal B.Shah & Anr. Vs. D.K. Guha & Ors. reported in A.I.R. 1973 S.C. 1196** and an unreported decision of the Division Bench of this Court (to which one of us was a party i.e. V.K. Tahilramani, J.) dated 13th February, 2003. The said decision is rendered in Criminal Application no. 1983 of 2004 in the case of **Intelligence Officer, D.R.I. Vs. Amjad Hussein Khan Vs. State.** He has placed reliance on para 38 of the said judgment. In order to properly appreciate the contention put forth we find it necessary to reproduce the relevant portion of Article 20(3):-

. **20. Protection in respect of conviction for offences**

(1) ....

(2) ....

. (3) No person accused of any offence shall be compelled to be a witness against himself.

46. On going through Article 20(3) of the Constitution of India, it is clear that for a person to be granted protection under Article 20(3) of the Constitution of India, two requirements have to be satisfied i.e. (a) he should be accused of an offence and (b) he should be compelled to be a witness against himself. Only if there is compliance of both the requisites, a person would be protected. Compliance of any one of these two requisites would not afford him protection under Article 20(3) of the Constitution. The statement of accused no.1 which is at Exhibit-44 came to be recorded on 2.7.1997. He came to be arrested on 3.7.1997. His second statement i.e. Exhibit-81 came to be recorded on 16.9.1997 and complaint against him came to be filed on 29.9.1997. From these facts, it is clear that a formal accusation came to be made against accused no.1 Krishna Shetty only on 29.9.1997 i.e. when the complaint against him came to be filed. Even in the

decision in the case of **Intelligence Officer D.R.I. Vs. Amjad Hussein Khan (Supra),** this Court after considering various decisions on the aspect has held in para 38 that the statements which have been recorded during the course of an inquiry or in answer to the summons under Section 67 of the N.D.P.S.Act, are not hit by Article 20 (3) of the Constitution of India if the complaint has not been filed at the time when the statement was recorded. It was further held that the statement even though confessional in nature, is not hit by Article 20(3) of the Constitution of India as the person was not an accused at the time when the said statement was recorded. Reliance was placed on the decision of the Apex Court in the case of **Ramesh Mehta reported in A.I.R. 1970 S.C. 940** wherein it is observed that "Till there is no formal accusation, a person is not an accused and therefore, protection under Article 20(3) of the Constitution of India, would not be available."

47. In respect of the second case on which reliance has been placed on behalf of accused no.1 i.e. **Ramanlal Shah (Supra)**. It is pertinent to note that the said decision has been considered by the Supreme Court in a subsequent decision in the case of

K.I.Pavunny Vs.Assistant Collector (H.Q.) Central Excise Collectorate reported in (1997) 3 S.C.C. 721. After considering the decision in the case of **Ramanlal Shah,** the Supreme Court has observed that a person becomes an accused only after summons are issued by the competent Court/Magistrate pursuant to a complaint lodged by the competent customs officers. Hence, the statement of an accused recorded during enquiry under Section 108 of the Customs Act or during the confiscation proceedings, is not that of an accused.

48. The case of **Pauvnny** covers and deals with the case wherein the statement was recorded by the Customs Officers under Section 108 of the Customs Act. In the said case, not only the accused were arrested but F.I.R. had also been filed against the accused persons in the said case including the appellant, whereas, in the present case no F.I.R. or complaint has been filed against the accused no.1 at the time when his statements were recorded. The statements of accused No.1 have been recorded under Section 67 of the N.D.P.S.Act by Officers of D.R.I. It is clear that officers of D.R.I. are not police officers. It is also well settled that D.R.I. officers empowered under Section 53 of the NDPS Act

with powers of an officer incharge of the Police Station, are not "police officers' within the meaning of Section 25 of the Evidence Act. Therefore, a confessional statement recorded by such an officer in the course of investigation under the N.D.P.S. Act, is admissible in evidence against the person making it. While deciding this question, the crucial test which is to be applied is whether such officers are entitled to file a charge-sheet.

49. In the case of **Raj Kumar Karwal Vs. Union of India reported in 1990 S.C.C. (Cri.) 330: 1990(2) S.C.C. 409** this very question came up for consideration, before the Supreme Court. In the said case, it is observed as under:

> . Officers of the Department of Revenue Intelligence who have been invested with the powers of an officer-in-charge of a police station under Section 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985, are not "police officers" within the meaning of Section 25 of the Evidence Act, 1872. Therefore, a confessional statement recorded by such

officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence as against him. Officer appointed under Section 53 other than a police officer is not entitled to exercise "all" the powers under Chapter XII of the Code including the power to submit a charge-sheet under Section 173 of Cr.P.C.

. Even if an officer is invested under any special law with powers analogous to those exercised by a police officer-in-charge of a police station investigating a cognizable offence, he does not thereby become a police officer under Section 25, Evidence Act, unless he has the power to lodge a report under Section 173 of the Code. Any person on whom power to investigate under Chapter XII is conferred can be said to be a ‘police officer’, no matter by what name he is called. The nomenclature is not important, the content of the power he exercises is the determinative factor. The important attribute of police power

> is not only the power to investigate into the commission of cognizable offence but also the power to prosecute the offender by filing a report or a charge-sheet under Section 173 of the Code. There is nothing in the provisions of the Act to show that the legislature desired to vest in the officers appointed under Section 53 of the Act, all the powers of Chapter XII, including the power to submit a report under Section 173 of the Code."

. A similar test has been applied by the Supreme Court in the case of **Badku Jyoti Svant Vs. State of Mysore A.I.R. 1966 S.C. 1746: 1966 Cri.L.J. 1353** wherein all statements recorded by officers of the Customs and Excise were being considered. Their Lordships held that the Deputy Superintendent of Customs and Excise is not a Police Officer and hence, the statement is admissible in evidence.

50. In view of the settled position mentioned above the confessional statement made by accused no.1 Krishna Shetty Exhibit-44 and Exhibit-81 before the D.R.I. Officers are admissible in evidence and can

be looked into. We further find that these statements clearly establish the guilt of accused no.1 Krishna Shetty.

51. The next contention advanced on behalf of the accused no.1 Krishna Shetty is that no reliance can be placed on these statements in view of the fact that these statements have been retracted. In this connection, it may be noted that only the first statement (Exhibit-44) dated 2.7.1997 has been retracted and the second statement has not been retracted. From the second statement, connection of accused no.1 and Divya Impex is clearly seen. As far as first statement Exhibit-44 is concerned, the statement has been retracted by the accused no.1 Krishna Shetty on the ground that it was recorded under duress, undue influence and threats. Accused no.1 has stated in his retraction that his statement was taken under force, coercion and duress by the officers, however, having perused the statements Exhibits-44 and 81 and the depositions of the prosecution witnesses especially P.W.2 Sukhpalsingh who recorded the statements, there does not appear to be any truth in the submission that threats, coercion or force was used on accused no.1 for recording his statements. Apart from the bald statement made by

accused no.1 in his retraction that the statement dated 2.7.1997 was "extracted under compulsion" which fact has been denied by the respondents, there is no other material placed on record from which we may assume any element of "compulsion" being exercised as alleged by the appellant/accused no.1.

52. The learned Advocate for accused no.1 Krishnanad Shetty submitted that the first statement made by accused no.1 has been retracted by him and hence, it cannot be solely relied upon to convict accused no.1. In the present case, the question which has arisen before us is whether the statement made by accused no.1 can form the sole basis for his conviction. The Constitution Bench in the case of **Soni Vallabhdas Liladhar Vs. The Asstt.Collector of Customs Jamnagar reported in A.I.R. 1965 SC 481:(1965) 3 S.C.R.854** has upheld conviction on the basis of retracted confession. In the said case the stand taken by the appellant-accused was that though they had signed the statements, they did not know what the statements contained and they signed the statements on being asked by their lawyer. The Supreme Court observed that "This part of the Statements of the appellants has not been believed by the Courts below and in our opinion rightly". In the present case, it is seen

that admittedly accused no.1 Krishnand Shetty has made a statement which is in his own handwriting. In the said statement, he has given wealth of details running into 15 written pages. The details which are found in the statement were specially within the knowledge of accused no.1 Krishnand Shetty and a detail elaboration of the same is not material. It is pertinent to note the second statement (Exhibit-81) has not been retracted by accused no.1. As far as the first statement (Exhibit-44) is concerned, we find that the said statement has been painstakingly corrected by accused no.1 in not less than 35 places. The said corrections have been carefully initialled. From all these facts, it appears to us that the statement (Exhibit-44) was true and voluntary and it has been retracted as an after thought on legal advice.

53. It would be advantageous to quote the observations made by the Supreme Court in the case of **Pavunny Vs. Assistant Collector (HQ) Central Excise Collector Kochin; (1997) 3 S.C.C.721**. In the said case, it has been held that a confessional statement recorded by reason of statutory compulsion or given voluntarily by the accused pursuant to his appearing against summons or on surrender, cannot be said to

have been obtained by threat, inducement or promise, hence, it is admissible in evidence for prosecution. In the said case, the Supreme Court has further held that such confessional statement although subsequently retracted if on facts, it is found voluntary and truthful, can form the exclusive basis for conviction. It would thus be seen that there is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same the basis for conviction of the accused. It is well settled that DRI officers are not police officers and it has been held in the case of **Raj Kumar Karwal Vs. Union of India and others (supra)** that DRI Officers are not police officers and hence, statement recorded by them even if in the nature of confession also binds the person who makes the same. Such statement is admissible evidence and can be made the sole basis for conviction. So also in the case of **Vallabhdas (Supra)** it has been held that the retracted confessional statement can form the basis for the conviction of the accused.

54. On the basis of the decision of the Supreme Court in the case of **Pavunny (supra)**, it is quite clear that the retracted confession can be made the

sole basis for the conviction of the accused person making the same. We have already observed that having perused the statements and depositions of the prosecution witness P.W.2 S.S.Dhani who recorded the statements of accused no.1 Krishnand Shetty, it does not appear that the statements were recorded under any threat, coercion or force. Even otherwise, apart from this confessional statement, the prosecution has clearly established that accused no.1 Krishnand Shetty was very much concerned with the export consignment of Mandrex. We are at pains to reiterate that this is not a case wherein the only evidence against the accused no.1 Krishnand Shetty is the confessional statements (Exhibits 44 and 81) made by him. We have discussed above that there is other evidence on record which connects accused no.1 Krishnand Shetty with the export of Mandrex tablets.

55. Thereafter, the learned advocate for the accused has submitted that in the present case, under the N.D.P.S.Act, only one formula of Methaqualine i.e. "2-Methyl-3-0-toly1-4-(3H)-quinazolinone is mentioned. It is further submitted that methaqualone structure is known not just by the above formula but it is also known as (i) 2-Methyl-3-0-toly1-4-(3H) quinazolinone, (ii) 2-Methyl-3- (2-methylphenyl)

-4(3H)-quinazolinone, (iii) 3,4-dihydro-2-methyl-4-oxo-3-0-tolylquinazoline, (iv) QZ-2, (v) Metholquizolone, (vi) rIC-272 and (vii) TR-Qualalude. It is further submitted that out of the seven formulae, only one of them i.e. '2-Methyl-3-0-toly1-4(3H)-quinazolinone' is mentioned in the schedule under the NDPS Act. In the C.A. report there is no mention of 2-Methyl -3- 0-toly1-4 (3H) - quinazolinone. The C.A. report only mentions that the samples of tablets answers test for presence of Methaqualone and Diphen Hydramine Hydrochloride. It was further submitted that as the C.A. report mentions Methaqualone and Diphen Hydramine Hydrochloride as such, it cannot be conclusively said that assuming that Mandrex tablets contained Methaqualone, it was of the same formula as one given in the schedule under the NDPS Act. It is further submitted that unless seized substance is of the description given under the provisions of the Act, the accused cannot be convicted. Briefly stated the contention is that if any other formula of Methaqualone was possessed or seized from the accused, it would not be punishable under the Act. As this point was not raised before the trial Court, an opportunity was given to the prosecution to answer this submission.

56. Mr.Satpute has filed affidavit of Shri.M.A. Juvale, Intelligence Officer in D.R.I. wherein it is stated that query was put to the University Department of Chemical Technology (UDCT) Mumbai by the Narcotic Control Bureau and the Professor of Pharmaceutical Chemistry and Head of the Department of Pharmaceutical Sciences and Technology Institution of Chemical Technology, University of Mumbai, has stated that 'Methaqualone has only one structure and there does not exist different types of Methaqualone. Thus, it is submitted that all the seven formulae given above, are different names for Methaqualone but the basic structure of Methaqualone is the same. In view of the above we find no substance in the submission made on behalf of the accused.

57. It was thereafter submitted by the defence that it was essential for the prosecution to prove that the tablets seized were a psychotropic substance. It is further submitted that in the present case, the prosecution has not proved that the tablets seized on 1.7.1997 were a psychotropic substance. Thereafter, it was submitted that the C.A. report nowhere says what was the composition of the tablets nor does it state that what tests were carried out to find out

the composition of the tablets, hence, it cannot be conclusively said that what was seized was infact, Methaqualone. Reliance has been placed on an unreported decision of the Division Bench of this Court dated 21.12.2001 in the case of **Mr.J.L.Pandey Vs. Sherif Khan Rashidkhan in Criminal Appeal No. 749 of 1997** (Coram: V.G.Palshikar and S.S.Parkar, JJ.). In the said case, it is held that when the report does not state the composition of the tablets nor the tests which were carried out by the C.A. to find out the composition of the tablet nor the C.A. has been examined to state that, then such evidence would be inadequate to show that the tablets were a psychotropic substance. Thus it was held in para 44 that the prosecution failed to prove that the drug found in the truck was a psychotropic substance.

58. Reliance was also placed on the decision in the matter of **Mr.Mohd. Hanif Mansuri and another Vs. State of Maharashtra reported in 2003 All Mah.Reporter (Cri.) 506.** In the said case a large quantity of Mandrex tablets was found stored. In the said case, the C.A. was examined but he was unable to state what constituted Methaqualone. On the contrary, the C.A. gave a wrong ingredient of it. It was held that as the evidence of the C.A. was

found shaky and not convincing, it could not be said that the substance examined by the C.A. was indeed Methaqualone. Reliance was also placed on an unreported decision of this Court dated 2nd December, 2003 in **Criminal Appeal No. 1275 of 2002 in the case of Rajesh Popatlal Thakkar Vs. I.O. Narcotic Control Bureau (Coram: Chitre,J).** In the said case the C.A. was examined. It is observed in para 18 of the judgment that the C.A. has stated that he did not remember the chemical formula of Methaqualone and before carrying out the analysis of the Mandrex tablets, he did not try to find out as to what are the components of Mandrex tablets. Keeping in view these answers given by the C.A. this Court observed that the evidence of the C.A. was shaky and it did not conclusively show that he really carried out the test in a scientific way. Thus, no reliance was placed on the evidence of C.A. and it was held that the prosecution did not conclusively prove that what was seized was Mandrex tablets. Thus, the accused came to be acquitted.

59. On behalf of the accused, reliance was also placed on an unreported decision of the Division Bench of this Court dated 24.11.1997 in the case of **Deen Khan Mohamed Vs. State of Goa in Criminal**

Appeal No. 27 of 1997. (Coram: R.M.Lodha and R.K.Batta, JJ.) In the said case the accused came to be acquitted as it was found that the evidence of the C.A. could not be relied upon as the C.A. did not state on what basis and chemical methods applied by him, he came to the conclusion that the substance analysed by him, was heroin. In the facts of the said case, it was held that as the opinion of the Expert was bereft of grounds on which the opinion was formed, it was found to be of no help and thus, no reliance was placed on the same. Reliance was also placed on the case of **Nicklaus Peter Vs. State of Goa reported in 1998(2) Mh.L.J.884**, wherein it was held that mere opinion expressed by C.A. cannot be relied upon to conclude that it was 'Charas' as the C.A. neither in his report nor in his evidence mentioned the details on which the Court can come to the conclusion that it was 'Charas'. Hence, in that case, it was held that prosecution failed to prove that the accused was in possession of 'Charas' and hence, he came to be acquitted.

60. The facts of all the above cases mentioned in para nos. 58 and 59 above, on which reliance has been placed, are entirely different from the facts of the present case and hence, we are not required to

express any opinion on the proposition laid down in the above cases. The defence cannot press the proposition laid down in those decisions in their service. In the present case, it is to be noted that C.A. was not at all examined and reliance was placed by the prosecution only on the report of the C.A. We have already set out the contents of the C.A. report. No doubt, in the present case the C.A. report does not give the chemical formula of the tablet nor does it state what were the tests which were carried out to find out the composition of the tablets. The learned counsel for the appellant has submitted that this is fatal to the prosecution case since the C.A. has not been examined to prove the analysis report particularly when the report of the C.A. does not contain the details of tests nor does it mention the formula. However, in our view, in the facts of the present case, merely because the report of the C.A. is a cryptic one and it does not contain the required particulars would be of no help to the accused. It is pertinent to note that in the present case, there is no serious challenge to the fact that on 1.7.1997 at STP in the container containing plywood Mandrex had been concealed. No serious challenge has been raised in this case about the contents of the contraband article by way of

cross-examination or even in the statements of the accused under Section 313 of Cr.P.C. However, we have perused the statements made by the accused especially accused no.1 Krishnand Shetty wherein he has admitted his guilt although the said statement has been retracted subsequently. Even while retracting the statement, he did not make out a case that the substance which was found concealed in the plywood sheets which were being exported by Divya Impex, did not contain Mandrex tablets. In the absence of any suggestion or contention made by the accused during the entire proceedings either before the D.R.I. authorities or before the Court, the circumstance that merely because the C.A. report is cryptic, would not advance the contention made on behalf of the accused. Unless a serious dispute was raised either at the time of the seizure or at the time of cross examination about the contents of the material seized, the prosecution cannot be thrown to the wind on the ground that the report of the C.A. is cryptic and does not contain the particulars. We have examined the Analyser’s report, which contains the information that the analyst has received the sample as sent by the DRI authorities, it conforms to the particulars of the sample, seal and signature etc. It also contains the result of the analyst. It

is true that the report is cryptic. In view of the decision of this Court in the case of **Mr.J.L.Pandey (supra)** such cryptic report of analyst, particularly when the analyst has not been examined to prove the report would not be safe to rely upon. In our view also the Public Analyst's report containing only result without any other details may not be acceptable unless there is other corroborative evidence either by the analyst or by independent evidence that the contraband article contained objectionable substance. A similar view was taken by the Division Bench of this Court in the case of **Kalema Tumba Vs. Narcotic Control Bureau reported in 1998 All MR (Cri.) 596.** In the said case, the conviction was confirmed as it was held that even when the report of the C.A. is devoid of required particulars, the prosecution will not fail as there was no serious challenge by way of cross-examination or even before the officers or before the Court that the substance was not Heroin but it was some innocuous substance. Moreover, the accused in his statement though retracted, had also admitted his guilt.

61. The decision in the case of **Kalema Tumba (supra)** was challenged before the Supreme Court and it is

reported in **(1999) 8 SCC 257.** The Supreme Court in para 5 of the said decision has observed "It was next contended that the report which was given by the chemical analyser was a cryptic report and, therefore, no reliance could have been placed upon it. It was submitted that as it contained no details of the test, it had no evidentiary value. As rightly pointed out by the High Court the appellant had himself admitted in his statement under Section 108 of the Customs Act that it was heroin. Moreover, in this case we have evidence of the officers of the Narcotic Control Bureau also who had tested the substance found from the appellant. Therefore, this contention is also rejected."

62. So also in the present case, besides the report of the C.A. report, we have the statement of the appellant-accused no.1 Krishnand Shetty wherein he has admitted that he was exporting the Mandrex tablets. Besides which we also have the evidence of the Officers of the DRI who have tested the substance and found that it tested positive for Methaqualone. The said witnesses are P.W.2 Sukhpalsingh, P.W.3 Tolani, P.W.13 Gunjal, P.W.21 Anup Mirdha and P.W.47 Parmar. In fact P.W.13 Shri.Gunjal and P.W.21 Anup Mirdha are independent witnesses. We thus find that

there is sufficient evidence to show that the substance which was being exported was Mandrex tablets which contained Methaqualone.

63. It was further argued on behalf of the accused that in the case of **Kalema Tumba (supra)** the contraband was heroin which is clearly mentioned in the schedule of the NDPS Act, whereas, in the present case, what was seized was Mandrex tablets which are not specifically mentioned in the Act or in the schedule under the Act. What is mentioned in the schedule is Methaqualone however, in the present case, the C.A. report states that the samples of tablets answers test for presence of Methaqualone and Diphen Hydramine Hydrochloride It is further argued that the accused has not stated that he was involved in exporting Methaqualone but he has stated he was involved in exporting 'Mandrex tablets'. However, in this connection, it is to be noted that Mandrex is the popular name for preparation of Methaqualone and Diphen Hydramine Hydrochloride. In **Clarke's Isolation and Identification of Drugs, IInd Edition (1986) published by The Pharmaceutical Society of Great Britain, Department of Pharmaceutical Sciences** under the Heading of 'Methaqualone' it is stated that Mandrex is a proprietary name for preparations

containing Methaqualone and Diphen Hydramine Hydrochloride. So also in **Martindale The Extra Pharmacopoeia (Thirtieth Edition), Department of Pharmaceutical Sciences, edited by Royal Pharmaceutical Society of Great Britain and Edited by Dr.James E.F.Reynolds**, it is clearly stated that 'Mandrex' contains 'Methaqualone and Diphen Hydramine Hydrochloride'. Thus, from the statement of accused no.1, it is clear that he was involved in attempting to illegally export Mandrex which is a preparation of Mathequalone.

64. It was further argued on behalf of the accused that only 'Methaqualone' is punishable under the Act, however, what is found in the present case is 'Methaqualone and Diphen Hydramine Hydrochloride'. It was submitted that as another substance was found along with 'Methaqualone' it would not be covered by the NDPS Act. We granted time to the learned counsel for the accused to show that the substance Diphen Hydramine Hydrochloride either nullifies the effect of 'Methaqualone' or diminishes it in any manner. However, despite more than five days time being given, the counsel for the appellants were unable to show that 'Diphen Hydramine Hydrochloride' in any way nullified the psychotropic effect of Methaqualone or

diminished it in any manner. No further time was sought for on behalf of the accused.

65. In our view, there is one other aspect which is very important i.e. Sub-section (xxiii) of Section 2 of the N.D.P.S.Act. The relevant section reads as under:

> . "2 (xxiii) "Psychotropic substance" means any substance,natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule".

(EMPHASIS SUPPLIED BY THE COURT)

. In the present case, what was being exported, was clearly a preparation of Methqualone. As ‘psychotropic substance’ means any preparation of such substance specified in the schedule, thus, Mandrex which is a preparation of Methaqualone would clearly be covered by Section 2(xxiii) of the N.D.P.S.Act. There is no dispute that Methaqualone is included in

the list of Psychotropic substances specified in the Schedule. In the list of Psychotropic Substances in the Schedule, Methaqualone is mentioned at serial no.21. Mandrex clearly being a preparation of Methaqualone would thus, be covered by the provisions of the N.D.P.S.Act. Thus, we see no substance in the submission made on behalf of the accused on this aspect. Moreover, we have already observed above that appellant-accused no.1 Krishnand Shetty in clear words has stated in his confession that he was involved in the export of Mandrex tablets. Thus, in the present case, there is sufficient material which connects the accused no.1 Krishnand Shetty with the Mandrex which came to be seized on 1.7.1997.

66. Now we shall take up the case of accused no.3 Umesh Shetty.

. As far as Umesh Shetty is concerned, the material against him is his retracted statement (Exhibit-112) which was recorded on 30.4.1998. No other witness has stated in his evidence before the Court that accused no.3 Umesh Shetty was in any way connected with the Mandrex which was seized on 1.7.1997. In this connection, the prosecution has relied upon the evidence of P.W.14 Tanaji Patil. We have minutely

perused the evidence of Tanaji Patil. We find that Tanaji Patil in his evidence before the Court has not implicated accused no.3 Umesh Shetty in any manner. The prosecution has also placed reliance on the statement of Tanaji Patil which was recorded under Section 67 of the NDPS Act wherein, Tanaji Patil is supposed to have stated that at the time when accused no.1 Krishnand Shetty was visiting the godown and the plywood was being cut in the centre, accused no.3 Umesh Shetty was also present. First of all, Tanaji has denied making the statement that Umesh Shetty was present, but more pertinently accused no.3 Umesh Shetty in his statement under Section 313 of Cr.P.C. has not been asked about the statement made by Tanaji. When any incriminating circumstance is sought to be used against any accused person, he must be asked about the same in his statement under Section 313 of Cr.P.C. The Supreme Court has laid down in the case of **Sharad Sarada reported in A.I.R. 1984 S.C. 1622** that incriminating circumstance which has not been put to the accused under Section 313 of Cr.P.C. cannot be used against him. Thus as in the present case, accused no.3 Umesh Shetty has not been asked on this aspect, the said circumstance cannot be used by the prosecution against him.

67. It is submitted by the learned counsel for the accused no.3 that after the statement of accused no.3 Umesh Shetty was recorded on 30.4.1998, it was retracted on the very same day. Though his statement was recorded by P.W.3 Mr.Tolani, a reply to the retraction was not filed by P.W.3 Mr.Tolani but it was filed by P.W.2 Sukhpalsingh Dhani. It was contended that the reply filed by D.R.I. Officer P.W.2 Sukhpalsingh cannot be taken into consideration as he had not recorded the statement of accused no.3 Umesh Shetty. It is true that the statement of accused no.3 was recorded by P.W.3 Tolani and the reply to the retraction was filed by P.W.2 Sukhpalsingh. However, in our view, this does not affect the prosecution case in any manner as P.W.2 Sukhapalsingh Dhani was the Investigating Officer in the present case and as such he was well conversant with the facts of the present case. Therefore, as such even otherwise also, he was a competent person to file his reply to the retraction of the accused no.3 Umesh Shetty. Thus, there is no merit in this submission.

68. Shri.Adik, the learned counsel appearing for the accused no.3 Umesh Shetty has advanced the same argument which was advanced on behalf of the accused no.1 Krishnand Shetty that the confessional statement

of accused no.3 Umesh Shetty was hit by Article 20(3) of the Constitution of India. On behalf of accused no.3, it was submitted that accused no.3 Umesh Shetty was brought by the officers of the D.R.I. from his residence to the office of DRI on 30.4.1998 and his statement was recorded on the very same day. It was argued that the very fact that the DRI officers brought him to the office of D.R.I. itself shows that he was arrested by the D.R.I. officers and hence, the protection under Article 20(3) of the Constitution of India, would be available to him. In this connection, it is pertinent to note that complaint against accused no.3 was filed on 27.7.1998 (Exhibit-96) and in view of the observations made in the case of accused no.1 Krishnand Shetty above, it is clear that till a formal accusation i.e. either the F.I.R. or complaint is filed, a person cannot be said to be an accused.

69. Thereafter, it was submitted on behalf of accused no.3 that the fact that accused no.3 was an accused on the date he made his confessional statement i.e. on 30.4.1998, can clearly be seen from the fact that in the complaint (Exhibit-90) dated 29.9.1997 filed against accused no.1 Krishnand Shetty and accused no.2 Gopal Mishra it is stated that accused nos. 1 and 2 conspired with Umesh Shetty to commit or abet the

commission of offence under the NDPS Act. Thus, it is submitted that in the complaint dated 29.9.1997 filed against accused nos.1 and 2, accused no.3 has been shown as an accused. It is also submitted that in the charge framed against accused nos.1 and 2 on 16.4.1998 (Exhibit-2) accused no.3 Umesh Shetty has been shown as conspirator. This shows that accused no.3 Umesh Shetty was an accused on 30.4.1998 when his statement came to be recorded hence, protection under Article 20(3) of the Constitution of India, was available to him. It was submitted that in such case, confessional statement of accused no.3 Umesh Shetty cannot be taken into account and cannot be used against him. However, in our view though the name of accused no.3 Umesh Shetty may have appeared in the complaint filed against accused nos.1 and 2 as well as in the charge framed against accused nos.1 and 2, however, at that time, accused no.3 was admittedly not arrested, so also no formal complaint had been filed against the accused no.3 Umesh Shetty at that time. Statement of accused no.3 Umesh Shetty came to be recorded on 30.4.1998. Thereafter, in the afternoon at 4.00 p.m. he came to be arrested and the complaint against him came to be filed only on 27.7.1998. In view of the various decisions of the Supreme Court and this Court quoted above, it is clear that till a formal

accusation i.e. either F.I.R. or a complaint against the person is made, he cannot be said to be an accused. Thus, at the time when the statement of accused no.3 Umesh Shetty came to be recorded, he was not an accused and thus, protection under Article 20(3) of the Constitution of India, would not be available to him.

70. However, there is one another aspect which has to be taken into consideration that is though accused no.3 Umesh Shetty was not an accused at the time when he made his statement, reliance can be placed on his confessional statement even though retracted, only if the same is found to be voluntary. Looking to the facts of the present case, we do not find that the confessional statement of accused no.3 (Exhibit-112) was voluntary. In this connection, it is pertinent to note the evidence of P.W.33 Surendra Shetty. Surendra Shetty has admitted that on 30.4.1998 prior to accused Umesh Shetty being taken from his house to D.R.I. office, the D.R.I. officers were insisting that he (accused no.3) should make a confessional statement about dealing in drugs. It has also come on record through the evidence of P.W.33 Surendra Shetty that infact accused no.3 Umesh Shetty had replied that he had not indulged in any activity relating to drugs.

Moreover, in the present case, the statement of accused no.3 Umesh Shetty is in English. In the statement under Section 313 of Cr.P.C., accused no.3 Umesh Shetty has specifically stated in answer to question no.97 that he does not know English. P.W.3 Tolani is the Officer who recorded the statement of accused no.3 Umesh Shetty. Our attention was drawn to the evidence of this witness. He has stated that the accused no.3 Umesh Shetty narrated the portion marked 'B' in his statement to him in Hindi and he (accused no.3) asked for an English translation thereof which this witness provided to him. It is the prosecution case that accused no.3 Umesh shetty was well conversant with English language and hence, his statement was recorded in English. If this was really so, there is no question of the accused Umesh Shetty asking for English translation. This Officer has further stated that he told him entire translation in English and thereafter, accused no.3 Umesh Shetty wrote it. As observed earlier, if as per the prosecution case accused No.3 Umesh Shetty was well conversant with English language, there was no question of him asking for any translation from Hindi to English. Thus, this raises a doubt in the mind as to voluntariness of the statement. The evidence of this Officer coupled with the evidence of P.W.33

Surendra Shetty, throws a dark cloud of doubt over the voluntariness of the statement of accused no.3 Umesh Shetty. In such case, we are not inclined to place any reliance on the confessional statement of accused no.3 Umesh Shetty. There is no other material which connects accused no.3 with the seizure of Mandrex. In this view of the matter, we are of the opinion that conviction of the accused no.3 Umesh Shetty deserves to be set aside.

71. As far as accused no.2 Gopal Mishra is concerned, the material which has been relied upon by the prosecution against him is his statement (Exhibit-60). We have carefully perused the said statement and we find that the said statement is totally exculpatory. The statements of the other two accused i.e. accused no.1 Krishnand Shetty and accused no.3 Umesh Shetty do not implicate the accused no.2 Gopal Mishra in any manner in exporting Mandrex. It is no doubt true that accused no.2 Gopal Mishra was the sole proprietor of Divya Impex and the Mandrex concealed in the plywood was being exported by the firm Divya Impex. The bank documents relating to Divya Impex and the cheques relating to Divya Impex have been signed by accused no.2 but from the evidence on record, it is clear that these documents were signed at the behest of accused

no.1 Krishnand Shetty. The cheques were signed in advance by accused no.2 Gopal Mishra on the say of accused no.1 Krishnand Shetty.

72. From the evidence on record, it is clear that accused no.2 Gopal Mishra was a poor employee of accused no.1 and accused no.1 used him as a front man for Divya Impex. Gopal Mishra was working as a Clerk in the firm Ravi Shipping Agency wherein accused no.1 Krishnand Shetty was a partner. Gopal Mishra was working in the said firm on a salary of Rs.2500/- per month. It was accused no.1 Krishnand Shetty who asked Gopal Mishra to get a firm operated in his name. The said firm was to deal in export of plywood. There is no material on record to show that accused no.2 Gopal Mishra knew in any manner that Mandrex was being concealed in the consignment of plywood which was to be exported.

73. P.W.5 Ratansen who was a partner of accused no.1 Krishnand Shetty in Ravi Shipping, has also stated that accused no.2 Gopal Mishra was working with accused no.1 Krishnand Shetty and Krishnand Shetty used to pay his wages. The order for the truck in which the plywood was loaded i.e. truck No.MH-04/C-6138 was also placed by accused no.1

Krishnand Shetty. There is no evidence to show that accused no.2 Gopal Mishra was in any way concerned with the procurement of the plywood or the truck or in packing and shipping of plywood in which the Mandrex was found concealed.

74. From the evidence of P.W.34 Hemant Banker, it is seen that accused no.1 Krishnand Shetty had placed the order for the plywood sheets in the name of Divya Impex. From the evidence of P.W.6 Ramraj Singh who is the owner of the transport Company, it is clear that it was accused no.1 Krishnand Shetty who arranged for the truck MH-04/C-6138. The said truck was used to carry the plywood from the godown at Bhiwandi to STP. From the evidence of the driver P.W.28 and from the evidence of P.W.8 Jaiswal and P.W.12 Mr.Keni, it is clear that it was accused no.1 Krishnand Shetty who was looking after the plywood consignment being loaded in truck no.MH-04/C-6138 at the godown in Bhiwandi. P.W.10 Mrs.Geeta Krishnan, Inspector of Central Excise, has stated that when the plywood was being loaded from the godown into the container placed on the truck, the representative of Divya Impex was present. Though Mrs.Krishnan does not identify the representative, P.W.12 Keni, Superintendent of Central Excise, has identified the said person to be accused

no.1 Krishnand Shetty. The owner of godown P.W.14 Tanaji Patil also identified accused no.1 Krishnand Shetty to be the person who had taken the godown on rent from him. He does not involve accused no.2 Gopal Mishra in any manner. Tanaji Patil has specifically stated that accused no.1 Krishnand Shetty was present when the centre of the plywood was cut and cavity was formed therein. It is to be noted that there is no admissible material on record to show that accused no.2 Gopal Mishra was present when the said act was carried out. Thus, from the material on record, it is seen that it was accused no.1 Krishnand Shetty who got floated the firm Divya Impex through his employee accused no.2 Gopal Mishra and Gopal Mishra did not know the true nature of the goods which were being exported.

75. Accused no.2 Gopal Mishra was residing in the premises of P.W.31 Shashikant Shahaji Bhosale and P.W.32 Shahaji Bhau Bhosale. From the evidence of P.W.31 Shahaji Bhosale, it has come on record that in the night of 14.5.1997, brother of accused no.2 Gopal Mishra expired in a railway accident at Kurla. Accused no.2 Gopal Mishra cremated him and proceeded to his native place with the ashes of his brother and he did not turn up thereafter. The prosecution has

relied upon the statement of accused no.2 Gopal Mishra (Exhibit-60). As noted earlier by us the said statement is exculpatory. In the said statement Exhibit-60, we find accused no.2 Gopal Mishra has stated that his younger brother Ashwini Kumar expired on 15.7.1997 in a train accident in Bombay. He took his remains to his native place on 28.5.1997 and came back to Bombay on 18.7.1997. In support of this statement, accused no.2 Gopal Mishra had produced a receipt of the additional Coroner of Bombay and other documents in respect of cremation of body of his brother and coming back to Bombay on 18.7.1997. The said documents i.e. railway ticket is at Exhibit-61 and receipt issued by Coroner of Bombay about cremation of body of brother of accused no.2 Gopal Mishra is at Exhibit-63. So also in his statement under Section 313 of Cr.P.C., accused no.2 Gopal Mishra has taken the same stand.

76. From the above facts and the other material on record which shows that accused no.2 Gopal Mishra was not available from 20th May, 1997 to 18th July, 1997, it is clear that he is not in any way concerned with the export of Mandrex.

77. In our view, after going through all the

evidence, the learned Special Judge has rightly acquitted accused no.2 Gopal Mishra. It is well settled that if a view of the acquittal could have been reasonably arrived at, then the circumstance that the appellate court could have taken a different view, would be no ground to interfere. In this connection, there is no dearth of authorities but to eschew prolixity, we refer to only a few of them viz. **A.I.R. 1971 S.C. 66 Khedu Mohton and others Vs. State of Bihar and A.I.R. 1987 S.C. 1083 Tota Singh Vs.State of Punjab.** We also feel that in this connection, it would be pertinent to refer to the decision of the Apex Court reported in **1995(2) SCC 486, State of Punjab Vs. Ajaib Singh**, wherein in para 7, Their Lordships of the Apex Court observed thus:-

. "We agree that this Court is not precluded or the Court hearing the appeal against acquittal is not prevented from examining and reappreciating the evidence on record. But the duty of a Court hearing the appeal against acquittal in the first instance, is to satisfy itself if the view taken by

> acquitting Court exercising appellate jurisdiction was possible view or not. And if the Court comes to conclusion that it was not, it can on reappreciation of evidence reverse the order".

78. In our view, looking to the material on record, the view of acquittal of accused no.2 Gopal Mishra was a reasonable and possible view. In the circumstances, we find no substance in Appeal No. 567 of 2000 filed by the Complainant D.R.I. Officer and the same is dismissed.

79. We have already observed earlier that there is no sufficient material to connect accused no.3 Umesh Shetty with the export of Mandrex and hence, the appeal filed by the accused no.3 deserves to be allowed.

80. As far as accused no.1 Krishnand Shetty is concerned, we have already observed that there is sufficient material to connect him with the offences for which he has been convicted. Hence, the appeal filed by accused no.1 Krishnand Shetty deserves to be dismissed.

81. In the result, we pass the following order:

. The appeal i.e. Criminal Appeal No. 388 of 2000 filed by original accused no.1 Krishnand Shetty is dismissed. The conviction and sentence dated 28.2.2000 recorded by the learned Special Judge in NDPS Special Case No.496 of 1997 is confirmed qua accused no.1 Krishnanand Shetty. Accused no.1 is in jail, he shall serve out remaining sentence.

. The appeal i.e. Criminal Appeal No. 281 of 2000 preferred by Accused no.3 Umesh Shetty is allowed. The conviction and sentence dated 28.2.2000 recorded by the learned Special Judge in NDPS Special Case No.496 of 1997 @ 224 of 1998 is set aside. The fine amount if paid, be refunded to the accused no.3. The accused no.3 Umesh Shetty is in jail. He be set at liberty forthwith if not required in any other case.

. The appeal i.e. Criminal Appeal No. 567 of 2000 preferred by Complainant-D.R.I. Officer, is dismissed. Original Accused no.2 Gopal Mishra is on bail. His bail bonds shall stand cancelled.

. Parties be supplied with the ordinary copy of this judgment.

[H.L.GOKHALE,J.]

[SMT.V.K.TAHILRAMANI,J.]